

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j) of the
Communications Act – Competitive Bidding
For Commercial Broadcast and Instructional
Television Fixed Service Licenses

MM Docket No. 97-234

Reexamination of the Policy Statement
On Comparative Broadcast Hearings

GC Docket No. 92-52

Proposals to Reform the Commission's
Comparative Hearing Process to Expedite
The Resolution of Cases

GEN Docket No. 90-264

To: The Commission

PETITION FOR RECONSIDERATION

Barbara D. Marmet ("Marmet") and Frederick Broadcasting LLC, which is the licensee of WAFY (FM), Middletown, Maryland and which is owned and controlled by Marmet, pursuant to Section 1.429(d) of the Commission's rules, hereby petition for reconsideration of the First Report and Order in this proceeding, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licensees*, FCC 98-194, 63 Fed. Reg. 48615 (1998) (hereafter *Bidding Order*). Separately, Marmet has moved for a stay of the effectiveness of the *Bidding Order* as it pertains to the Middletown, Maryland proceeding (MM Docket Nos. 83-985 and 83-987). In support, Marmet shows as follows:

Marmet participated as a party in GC Docket No. 92-52. She did not file comments in MM Docket No. 97-234, because she had formally moved on February 1, 1996, to dismiss the application of Jerome Thomas Lamprecht ("Lamprecht"), in the Middletown, Maryland proceeding, for Lamprecht's lack of basic threshold qualifications and his lack of candor. Lamprecht had lost his transmitter site in October, 1982, and he had concealed that fact from the Commission until September, 1990. As a result, Marmet did not consider the Middletown, Maryland proceeding to be a comparative proceeding and anticipated prompt action on her February 1, 1996, "Motion to Dismiss Application of J. T. Lamprecht" ("Motion"). However, the Commission has not yet acted on her Motion. Rather, the Commission indicated in its *Bidding Order* that pending initial licensing proceedings, including the sixteen-year old Middletown proceeding, would be resolved by competitive bidding, and that it would defer consideration of basic qualifying issues until after an auction.

These conclusions adversely affect Marmet, and for that reason she seeks reconsideration. Inasmuch as Marmet did not submit comments in the most recent phase of this proceeding (MM Docket No. 97-234), and she had only participated as a party in an earlier phase of the proceeding, Marmet may not be a "party to the proceeding resulting in the action" under Section 1.429(j) of the rules. Accordingly, under Section 1.429(j) she would have to file a petition for reconsideration to qualify to seek judicial review.

Marmet submits that consideration by the Commission of the facts relied on in this petition for reconsideration is required in the public interest. These facts have, of course, been before the Commission in the Middletown, Maryland proceeding for over eight (8)

years. However, they were not explicitly reiterated in this rulemaking proceeding, and the current Commissioners may not have had the opportunity to consider them.

Because this area of law is in a state of flux, Marmet specifically reserves the right to supplement this petition for reconsideration. *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040-41, 8 CR 727 (DC Cir 1997).

Background Chronology

- On March 10, 1982 Lamprecht entered into an Agreement of Sale and Purchase with Mr. and Mrs. James R. Remsburg for the purchase of approximately three acres of land for the price of \$35,000 ("Agreement"). That Agreement provided that the Settlement would be held on or before October 1, 1982. An Addendum to the Agreement also dated March 10, 1982, provided that if the FCC and the Frederick County Planning and Zoning Commission did not give their approvals, then the contract would be null and void and the deposit returned in full.
- On April 9, 1982 Lamprecht tendered for filing his application for a construction permit for a new FM broadcast station on Channel 276A at Middletown, Maryland.
- On September 8, 1982 Marmet tendered for filing her application for a construction permit for a new FM broadcast station on Channel 276A at Middletown, Maryland.
- On October 2, 1982 Lamprecht lost basic qualifications and began a cover-up of the site defect. Lamprecht no longer had a reasonable expectancy that his proposed site would be available to him, a fact that Lamprecht concealed until September 19, 1990.
- On September 1, 1983 Marmet's and Lamprecht's applications were designated for hearing.
- On June 8, 1984 Administrative Law Judge Walter C. Miller issued his Initial Decision, granted Marmet's application and denied Lamprecht's application. *Jerome Thomas Lamprecht*, 99 FCC 2d 1229 (ALJ 1984).
- On December 11, 1984 the Review Board granted Marmet's application and denied Lamprecht's application. *Jerome Thomas Lamprecht*, 99 FCC 2d 1219 (Rev. Bd. 1984). On January 17, 1985 Lamprecht applied for Commission review of the Review Board Decision.

- On November 6, 1986 Marmet filed her "Motion For Decision Without Regard For Female Preference," wherein Marmet requested the Commission "to decide this case without regard for a female preference" and to immediately issue its decision in the Middletown proceeding.
- On November 18, 1986 Lamprecht filed his "Comments Of Jerome Thomas Lamprecht On 'Motion For Decision Without Regard For Female Preference'" and objected to Marmet's request as "unprecedented and inconsistent with the public interest." Comments at p. 2.
- On April 29, 1987 Marmet filed her "Motion For Decision On Review" and requested the Commission to expeditiously decide the Middletown proceeding. Lamprecht opposed that motion on May 8, 1987.
- On April 15, 1988 the full Commission unanimously affirmed the grant of Marmet's application and the denial of Lamprecht's application. *Jerome Thomas Lamprecht*, 3 FCC Rcd. 2527 (1988), *recon. den.*, FCC 88I-062 (released June 28, 1988).
- On June 1, 1988 Lamprecht appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit but limited his appeal to the single issue of the constitutionality of gender enhancement. He sought and obtained repeated extensions, until October 5, 1990 to file his brief.
- On July 7, 1988 the Commission issued to Marmet an unconditional construction permit to operate on Channel 276A at Middletown, Maryland and later that month assigned the call sign "WAFY(FM)".
- On July 21, 1989 Marmet filed with the FCC a Certification requested by the FCC staff that "she immediately will begin building the proposed facilities after the application [BMPH-890413TB] for modification of construction permit is granted."
- On May 7, 1990 Marmet commenced operation of WAFY(FM), Middletown, Maryland, and Marmet has operated WAFY continuously since that date.
- On May 14, 1990 Marmet tendered an application for license to cover construction permit.
- On August 30, 1990 Marmet sent a letter to the FCC's Associate General Counsel stating that Lamprecht did not have a site for construction of the facilities proposed in his application.
- On September 19, 1990 Lamprecht admitted that he did not have a site and that he had concealed this fact starting October 2, 1982. Lamprecht refused to seek leave to

amend his application, and he has not attempted to do so in the intervening eight years since September 19, 1990. Marmet therefore maintains that as a result of Lamprecht's actions and inactions this case ceased being a comparative one on October 2, 1982.

- On February 19, 1992 the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's decision and directed the Commission to resolve the case without considering the gender of the applicants. *Jerome Thomas Lamprecht v. FCC*, 958 F. 2d 382 (DC Cir 1992).
- On April 24, 1992 Marmet filed "Comments" as to what further action should be taken by the FCC in light of the Court's February 19, 1992 remand. Marmet stated that if the Commission did not affirm the grant of her application without further proceedings or hearings, then she reserved the right to petition to add disqualifying issues against Lamprecht. April 24, 1992 "Comments," p. 8, n. 8.
- On September 18, 1992 the Commission disregarded the gender preference, granted Marmet's application and denied Lamprecht's application. *Jerome Thomas Lamprecht*, 7 FCC Rcd. 6794 (1992). Lamprecht again appealed to the United States Court of Appeals for the District of Columbia Circuit. *Jerome Thomas Lamprecht v. FCC* (Case No. 92-1586).
- On December 15, 1993 Marmet filed her "Brief of Intervenor Barbara D. Marmet" in Case No. 92-1586. Therein, Marmet advised the Court of Appeals that "Lamprecht does not have pending an application that the FCC can grant."
- On February 9, 1994 the Court of Appeals remanded the case to the FCC "for further consideration in light of this court's decision in *Bechtel v. FCC*, No. 92-1378 (December 17, 1993)."
- On December 20, 1994 the Commission granted Marmet's application for license (BLH-900514KB).
- On September 22, 1995 the Commission granted Marmet's application for renewal of the WAFY license (File No. BRH-950530UA).
- On December 4, 1995 the Commission granted Marmet's request to assign WAFY to Frederick Broadcasting LLC, a company which she controlled (File No. BALH-951120GE).
- On February 1, 1996 Marmet filed her "Motion to Dismiss Application of J. T. Lamprecht" ("Motion"), wherein Marmet requested that the Commission dismiss with prejudice Lamprecht's application because: (a) Lamprecht lacked a grantable technical proposal; (b) Lamprecht had violated Section 1.65 of the rules by failing to maintain

the continuing accuracy and completeness of his application, and (c) Lamprecht had violated Section 73.3526 of the rules by failing to maintain a complete public inspection file for his application.

- On February 16, 1996 Lamprecht responded by filing "Jerome Thomas Lamprecht's Opposition to Marmet's Motion to Dismiss Application," as well as a "Motion for Rescission of License and Consent to Assignment"
- On February 28, 1996 Marmet responded to both filings with her "Reply to Opposition to Motion to Dismiss Application of J. T. Lamprecht" and her "Motion to Stay Consideration of Motion for Rescission of License and Consent to Assignment."
- On January 20, 1998 in the absence of any Commission action, Marmet tendered her "Request for Action on Motion to Dismiss Application of J. T. Lamprecht and Request to Terminate Proceeding." Attachment 3 therein is the Affidavit of James R. Remsburg. Mr. Remsburg states that Lamprecht did not call for closing under the March 10, 1982, Agreement and that the Agreement became null and void. Mr. Remsburg further states that as of October 2, 1982 there was no contractual obligation for the Remsburgs to sell the property to Lamprecht and that there was no land available to Lamprecht.
- On January 29, 1998 Lamprecht responded with two filings – his "Jerome Thomas Lamprecht's Opposition to Marmet's Request for Action on Motion to Dismiss Application" at the FCC and a "Petition for Writ of Mandamus Directed to the Federal Communications Commission" filed with the United States Court of Appeals for the District of Columbia Circuit in *Jerome Thomas Lamprecht*, Case No. 98-1052.
- On February 10, 1998 Marmet filed with the FCC her "Reply to Lamprecht's Opposition to Marmet's Request for Action on Motion to Dismiss Application of J. T. Lamprecht and Request to Terminate Proceeding."
- On March 19, 1998 Marmet supplemented her Reply with the "Request for Leave to File and Tender of Supplement to Marmet Reply," in which she provided a Letter Affidavit from retired Administrative Law Judge Walter C. Miller who had presided at the Middletown hearing. Judge Miller stated that, based upon his review of the record, Lamprecht was lacking in candor with and deceived the Judge, the Commission and the Court of Appeals with his "fictional application." Furthermore, Judge Miller states that "since Lamprecht has abused both the FCC's and the Court of Appeal's processes, his character qualifications are deficient."
- On March 26, 1998 the FCC filed with the Court of Appeals its "FCC Opposition to Petition for Writ of Mandamus," wherein the FCC advised the Court, at page 8, that

“there [are] outstanding and unresolved questions as to Lamprecht’s qualifications to receive a grant of his application.”

- On March 31, 1998 Lamprecht filed with the FCC his “Jerome Thomas Lamprecht’s Memorandum in Support of Marmet’s Request for Leave to File and Tender of Supplement to Marmet Reply.”
- On May 8, 1998 the Court of Appeals denied Lamprecht’s petition for writ of mandamus, stating that Lamprecht “has not established that he is entitled to the grant of his application.”
- On October 1, 1998 Marmet filed her “Renewed Motion To Dismiss Application Of J. Thomas Lamprecht And Waiver Request” (“Renewed Motion”), wherein Marmet asked the Commission: (a) to act on her February 1, 1996 Motion or (b) to waive the new rules and procedures adopted in the *Bidding Order* to the extent the Commission would postpone action on the Motion.

On September 8, 1982 Marmet filed her application for construction permit for Channel 276A at Middletown, Maryland. **That was over sixteen (16) years ago.** The Middletown, Maryland proceeding (MM Docket Nos. 83-985 and 83-987) is the oldest – by many years – initial licensing proceeding pending before the Commission.

Over eight (8) years ago, on August 30, 1990 Marmet first brought to the Commission’s attention the fact that Lamprecht no longer had available to him the transmitter site proposed in his application and that he therefore lacked basic threshold qualifications. Moreover, on September 19, 1990 Lamprecht admitted that he had in fact lost his transmitter site as of October 1, 1982. Therefore, for over sixteen (16) years, Lamprecht has failed to have pending before the Commission an application that could be granted. For the first eight of those sixteen years, Lamprecht concealed that fact from the Commission and the U.S. Court of Appeals for the D.C. Circuit. Lamprecht has

steadfastly refused to attempt to take any action to try to cure this problem, and it is now too late to do so. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (1970).

Since August 30, 1990 at all appropriate stages in this proceeding, Marmet has repeatedly urged the Commission to consider on the merits Lamprecht's September 19, 1990 admission that after October 1, 1982 he no longer had a transmitter site, that he had concealed this fact from the Commission and that he lacked basic qualifications. Based on this, Marmet urged the Commission to dismiss Lamprecht's application.

The Commission did not act on Marmet's Motion, to dismiss Lamprecht's application, even though it had the authority to do so and even though it had issued two Public Notices stating its intention to resolve issues of basic qualifications. See *Orion Communications Limited v. FCC*, 131 F.3d 176, 179, 181 (1997) ("*Orion*").

In its February 24, 1994 Public Notice *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), the Commission stated that notwithstanding the freeze, it "will continue to issue decisions only in cases in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case."

In its August 4, 1994 Public Notice *Modification of FCC Comparative Proceedings Freeze Policy*, 9 FCC Rcd 6689 (1994), the Commission affirmed "that during the freeze, the Commission . . . will continue to issue decisions only in cases in which consideration of the applicant's comparative qualifications is unnecessary to resolve the case," adding that "parties to pending comparative proceedings should not file or respond to motions to enlarge the issues, except in those proceedings in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case." The Commission added that

“proceedings will not be bifurcated to adjudicate the basic qualifications of some of the applicants, where their disqualification would leave unresolved comparative issues involving other applicants.”” *Id.* at 6690. The latter statements clearly applied to the two-party Middletown, Maryland proceeding, wherein dismissal of the Lamprecht application for lack of basic qualifications would terminate the proceeding.

The Commission now seems to suggest that it will not consider Lamprecht’s lack of qualifications until after an auction, *Bidding Order* at ¶¶ 90-91. This appears to be the case, despite the fact that if the Commission found Lamprecht unqualified and dismissed or denied his application, then there would be no auction, and the longest pending initial licensing proceeding could be terminated, consistent with the statutory mandate of Section 309(j)(6)(E) of the Communications Act of 1934, as amended, 47 USC §309(j)(6)(E).

That provision provides, as a mandatory rule of construction for competitive bidding, that:

Nothing in this subsection, or in the use of competitive bidding shall –

* * *

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.

In her October 1, 1998 Renewed Motion Marmet asked the Commission to act on her February 1, 1996 Motion, and, to the extent the Commission believes that its new rules and procedures adopted in *Bidding Order* would permit postponement of action on the Motion, then Marmet further requested a waiver of those rules and procedures. Marmet submitted a good cause showing in support of that waiver request.

Among other reasons, Marmet noted that the Middletown, Maryland proceeding is the oldest initial licensing proceeding pending before the Commission. The Commission

has twice adopted decisions on the merits granting Marmet's application and denying Lamprecht's application, on the false assumption that Lamprecht was basically qualified.

The Middletown proceeding has been before the United States Court of Appeals for the District of Columbia on three separate occasions. Most recently, in its March 26, 1998 "FCC Opposition To Petition For Writ Of Mandamus," the FCC directed the Court's attention to the fact that "there [are] outstanding and unresolved questions as to Lamprecht's qualifications to receive a grant of his application." FCC Opposition, p. 8. In its May 8, 1998 Order, denying Lamprecht's petition for a writ of mandamus, the Court said that Lamprecht "has not established that he is entitled to the grant of his application."

In both of its 1994 Public Notices the Commission stated its intention to address issues of basic qualifications where they would resolve the case. The Middletown proceeding involves only two parties. Dismissal of Lamprecht's application based on his admitted lack of basic qualifications would not require further hearings, would permit the Commission's grant of Marmet's application to become final and would permit the Commission to terminate the Middletown proceeding.

WAFY(FM), 103.1 mHz, Middletown, Maryland has been on the air continuously since May 7, 1990. The Commission's stated reason for adopting the procedures in the *Bidding Order* – to expedite inauguration of new services – is irrelevant with regard to Channel 276A at Middletown because WAFY is on the air and has been serving the public for over eight years.

The Public Interest Requires Reconsideration of the *Bidding Order*

Marmet seeks reconsideration of two actions adopted by the Commission in the *Bidding Order*: (a) the proposal to resolve by competitive bidding the Middletown, Maryland proceeding, *Bidding Order* at ¶¶ 51-59, and (b) the proposal to postpone until after auction in the two-party Middletown case, a decision on Lamprecht's basic threshold qualifications, *Bidding Order* at ¶¶ 90-91.

Middletown, Maryland Pending Applications

Section 309(l) of the Communications Act directed the FCC to resolve how to decide proceedings involving mutually exclusive applications filed before July 1, 1997. Obviously, that decision was made somewhat complex by the decision of the U.S. Court of Appeals for the D.C. Circuit in *Bechtel v. FCC*, 10 F.3d 875 (DC Cir 1993). The FCC eventually chose to place no significance on cases in distinctly different procedural postures and decided to resolve all pending initial licensing proceedings by auctions, regardless of their individual circumstances.

The Commission's proposal encompasses the Middletown, Maryland proceeding, which is the oldest – by many years – pending initial licensing case. The Middletown, Maryland proceeding progressed through an Initial Decision in 1984 – over fourteen (14) years ago. The Middletown, Maryland proceeding progressed through a Review Board Decision later in 1984. Both the ALJ and the Review Board granted Marmet's application.

Moreover, the full Commission has twice decided the case on the merits – in 1988 and in 1992. Each time the Commission unanimously granted Marmet's application.

Finally, this case has been before the United States Court of Appeals for the District of Columbia Circuit on three (3) separate occasions

This is a decidedly unique set of facts, which the Commission ignored, particularly the fact that the Commission has already decided the case on the merits and twice granted Marmet's application.

The only reasons given by the Commission for resolving the Middletown case by competitive bidding is that auctions "will much more likely expedite service to the public," *Bidding Order* at ¶ 53, and that resolving the case through the comparative process "would further delay service to the public," *Id.* at ¶ 55.

However, in the case of Channel 276A at Middletown, Maryland WAFY(FM) commenced operation over eight (8) years ago and has been serving the public continuously ever since. Marmet took extraordinary steps to make sure that the public did not suffer from the delays she has had to endure.

Those delays were not of Marmet's making. Moreover, those delays were completely unnecessary. There is no valid reason why the Middletown proceeding should be resolved by competitive bidding when the Commission has twice granted Marmet's application and when the case is pending today only because of unnecessary delays. The Commission has had numerous opportunities since August 30, 1990 to consider the matter of Lamprecht's lack of basic threshold qualifications, to dismiss his application and to terminate the Middletown proceeding. The Commission's two 1994 Public Notices stated that the Commission would "continue to issue decisions . . . in cases in which consideration of the applicant's comparative qualifications is unnecessary to resolve the

case.” The Middletown case is the perfect example of this. Yet, the Commission did not issue a decision in the Middletown, Maryland proceeding, notwithstanding Marmet's February 1, 1996 Motion and her January 20, 1998 request for action on her Motion.

More significantly, however, Lamprecht has sought to delay Commission action on the merits. His tactics are epitomized by his recent motion for a writ of mandamus filed with the Court of Appeals. Therein he asked the Court to grant his application, even though the Court cannot grant applications and even though he has no technical proposal pending before the Commission that can be granted. Lamprecht advanced a single, frivolous argument that he had a constitutional right to a grant of his “fictitious application,” as retired AIJ Walter Miller characterizes it, simply because on remand the Commission followed the Court's mandate, disregarded the female gender preference and nonetheless concluded that Marmet remained the superior applicant, and that Lamprecht was the inferior applicant, on the other comparative factors. The grant of Marmet's application would probably have become final long ago if only Lamprecht had supported Marmet's November 6, 1986, “Motion For Decision Without Regard For Female Preference.” Obviously, if Lamprecht had supported Marmet, he would have had no grounds for appeal. Marmet should not suffer because of Lamprecht's delaying tactics, and Lamprecht should not benefit from his delaying tactics. *Orion, supra* at 180.

Marmet has long maintained that the Middletown case has not been a comparative case since Lamprecht's lost his transmitter site in October, 1982. Nevertheless, the Commission's comparative analysis of the applicants became final in 1988, when Lamprecht raised only one argument on appeal – the constitutionality of the gender

enhancement. Lamprecht did not raise any other issues, and thus the Commission's resolution of those issues became final. When the Commission followed the mandate of the Court of Appeals and disregarded the gender preference, it concluded that Marmet remained the superior applicant. The *Bechtel* case was then and remains today irrelevant to a resolution of the Middletown proceeding.¹

Basic Threshold Qualifications

The Middletown, Maryland proceeding is a unique two-party case. Issues concerning Lamprecht's basic threshold qualifications have been pending before the Commission for over eight (8) years. In a small two-party case like Middletown, Maryland a Commission decision on the merits of the basic qualifying issue on Lamprecht could avoid mutual exclusivity and eliminate the need for any selection process, whether by affirming and reissuing the Commission's decision of September 18, 1992 or by competitive bidding, consistent with the Congressional mandate set forth in Section 309(j)(6)(E) of the Communications Act. To postpone a decision on the merits of that basic threshold qualifications issue, especially when it has been pending so long and when Marmet has repeatedly requested Commission action, is highly prejudicial to Marmet and to the public that has suffered from Lamprecht's lack of candor, deception and rule violations.

Furthermore, the Commission views "misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust." *Swan Creek*

¹ Since both Marmet and Lamprecht had proposed and received 100% full-time quantitative integration credit, that quantitative factor was never decisional in the Middletown proceeding.

Communications, Inc. v. FCC, 39 F.3d 1217, 1221-23 (DC Cir 1994). The Commission should deal promptly and not postpone action when it encounters such breaches of trust, as exhibited by Lamprecht. The Commission has indicated that "substantial" comparative demerits are warranted for such character defects. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 399 (1965).

It is understandable why the Commission might want to postpone a decision on qualifying issues where such action would not resolve the overall proceeding and bring it to termination. However, in the Middletown proceeding a decision on the pending Motion could resolve the uncertainties and result in termination of the proceeding. There are no questions of fact. The record is fully established, and Lamprecht has admitted the facts. There is no need for further hearings. The matter is ripe for Commission decision on the conceded facts. There is no reason to deviate from the basic FCC principle that only qualified applicants are entitled to consideration.

Moreover, as noted above, a Commission decision on Lamprecht's basic threshold qualifications would not delay service to the public, because the public is already receiving service from WAFY(FM), as it has for the past eight years.

Special Circumstances

The Commission said that "Congress intended us to focus on any special circumstances in these cases that would tip the policy balance in favor of comparative hearings." *Bidding Order* at ¶ 39. Marmet submits that the two-party Middletown, Maryland proceeding presents many unique "special circumstances", including the facts that the proceeding has been pending for over sixteen (16) years, that the Commission has

twice adopted decisions and granted Marmet's application, that the findings of fact and conclusions of law under the standard comparative issue became final except for the gender enhancement issue, that there are long-standing basic threshold qualifications issues outstanding against Lamprecht that pre-date this rulemaking proceeding, that the Commission could have acted on those basic threshold qualifications issues long ago but did not, and that WAFY has been on the air for more than eight years. Yet the Commission took none of these special circumstances into consideration. Instead the Commission suggests that it would send to auction a case that it has already twice decided and will ignore basic qualifying issues that have been pending before it for over eight years.

Under these "special circumstances" the "reasonable expectations" of Marmet and the duty owed by the Commission to Marmet – a Commission licensee who has prosecuted her application for over 16 years – are very different from any other applicant. It is not unreasonable to expect an administrative agency to decide a few cases with particular attention for their "special circumstances." The agency had a duty to ensure that regulatory changes did not unfairly impact those cases where the full Commission had already adopted decisions on the merits. Stated conversely, it is arbitrary and capricious and an abuse of discretion for the Commission to ignore its own Public Notices about the handling of pending cases, as well as the adjudicatory history and the actions it had already taken in the Middletown proceeding. *Cf. United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432 (1996). The Commission made a contractual promise to Marmet to conclude the Middletown proceeding on the same basis as it had started, given that it had designated for hearing the Middletown applications; accepted Marmet's proposed findings

of fact and conclusions of law; granted Marmet's application; issued to Marmet a construction permit; modified that construction permit, and extracted from Marmet a promise to begin construction immediately.

WHEREFORE, Marmet requests that the Commission reconsider the *Bidding Order*, decide Marmet's Motion to dismiss Lamprecht's application, and, if it denies Marmet's Motion, then resolve the Middletown proceeding based on the existing record, affirming and reissuing its September 18, 1992 decision.

Respectfully Submitted,

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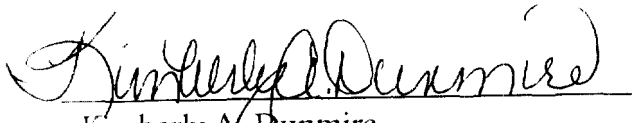
October 9, 1998

CERTIFICATE OF SERVICE

I, Kimberly A. Dunmire, do hereby certify that I have caused to be served by mail, First Class postage prepaid, this 9th day of October copies of the foregoing "Petition for Reconsideration" on the following persons:

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